

# Remediation and Redevelopment Division

## Michigan Department of Environment, Great Lakes, and Energy

Escrow Agreement Part 213.doc

04/21/2020

### ESCROW AGREEMENT PART 213

This document provides instructions on the use of an Escrow Agreement to fulfill the requirements for financial assurance pursuant to Section 21309a(2)(f) of Part 213, Leaking Underground Storage Tanks, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.21301 *et seq.* This document and the attached model document are provided to the public as preliminary guidance as to the content, format, and terms of the Financial Assurance Mechanism and are not intended, nor can they be relied upon to create any substantive or procedural rights by any other party.

Pursuant to Section 21309a of the NREPA, if initial actions under Section 21307 have not resulted in the completion of corrective action, an owner or operator that is liable under Section 21323a shall prepare a corrective action plan to address contamination at the site. If the corrective action plan includes the operation of a mechanical soil or groundwater remediation system, or both, a financial assurance mechanism to pay for monitoring, operation, and maintenance necessary to assure the effectiveness and integrity of the corrective action remediation system is required.

If a person elects to use an Escrow to meet their financial assurance obligations, an Escrow Agreement must be executed. The Escrow Agreement shall be:

1. Worded in accordance with the model Escrow Agreement. Any modification to the model language may only be made with the concurrence of EGLE.
2. Executed on the letterhead of the Escrow Agent and be between EGLE, the Escrow Agent, and the entity or person submitting the corrective action plan. It must also name EGLE as the sole beneficiary.
3. In an amount equal to, or greater than, the amount necessary to fund all monitoring, operation, maintenance, and other costs required to assure the effectiveness and integrity of the corrective action for the time frame(s) specified in the corrective action plan.
4. Held and managed by an Escrow Agent approved by EGLE that can be replaced at the direction of EGLE.
5. An escrow that only consists of cash and/or direct obligations of the United States of America (U.S.A.) or the State of Michigan, or obligations for which the principal and interest are unconditionally guaranteed by the U.S.A. or the State of Michigan, or certificates of deposit with any financial institution to the extent they are insured by an agency of the United States Government.
6. Worded in a manner that does not allow routine, monthly escrow maintenance fees, including advice of counsel, to be paid for from the Escrow.
7. Worded in a manner that only allows the Escrow Agreement to be terminated at the direction of EGLE.

Please contact Mr. Brad Ermisch, Compliance and Enforcement Section, Remediation and Redevelopment Division (RRD), EGLE, at [ermischb@michigan.gov](mailto:ermischb@michigan.gov) or 517-275-1173 for any questions relating to this document or the attached model document; or you may call the RRD main number at 517-284-5087 for assistance.

Drafting Instructions: Copy and paste the text portion of the model document onto appropriate letterhead. Drafting notes and examples appear as ***italicized bold font***, insertion directions appear as ***[italicized bold font within bold brackets]***, and word choices appear as ***[regular bold font within bold brackets]***.

--END OF GUIDANCE AND INSTRUCTIONS--

## **ESCROW AGREEMENT MODEL**

### **ESCROW AGREEMENT**

This Escrow Agreement is entered into by and between **[insert legal name of person submitting the Corrective Action Plan (SUBMITTER)]**; **[insert name of Escrow Agent]**; and the Michigan Department of Environment, Great Lakes, and Energy (EGLE) to provide financial assurance to assure the effectiveness and integrity of the corrective action documented in the Corrective Action Plan submitted by **[SUBMITTER]** on **[insert date of submittal]** for the **[insert name of the Part 213 site]** (Site), Facility No. **[insert Facility number]**, Confirmed Release No. **[insert Confirmed Release Number for the release(s) addressed by the corrective action plan]**.

Whereas, Section 21309a(2)(f) of Part 213, Leaking Underground Storage Tanks, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA) requires that **[SUBMITTER]** provide financial assurance to pay for monitoring, operation, and maintenance necessary to assure the effectiveness and integrity of the corrective action; and

Whereas, the Grantor has elected to establish an Escrow to meet **[insert as appropriate: its or his or her]** financial assurance obligations specified in the Corrective Action Plan; and

Whereas, the Grantor, acting through its duly authorized officers, has proposed an Escrow Agent under this Escrow Agreement; and

Whereas, EGLE approves the Escrow Agent proposed by the Grantor; and

Whereas, the Escrow Agent is willing to act as the Escrow Agent;

NOW, THEREFORE, the Grantor and Escrow Agent agree as follows:

### **I. DEFINITIONS**

“Beneficiary” means the Director of the Michigan Department of Environment, Great Lakes, and Energy, or **[his or her]** designee, or the Director’s authorized representative.

“Corrective Action Plan” means the plan submitted as part of a final assessment report by **[insert name of person submitting Corrective Action Plan]** to EGLE on **[insert date that corrective action plan was submitted]**, to address contamination at the Site and meet the requirements of Section 21309a of the NREPA.

“Escrow Agent” means the escrow agent who enters this Escrow Agreement and any successor or assigns of the Escrow Agent.

“Escrow Agreement” means this Escrow Agreement executed between **[SUBMITTER]**, the Escrow Agent and EGLE.

“Escrow Assets” means cash and/or direct obligations of the United States of America (U.S.A.) or the State of Michigan, or obligations for which the principal and interest are unconditionally guaranteed by the U.S.A. or the State of Michigan, or certificates of deposit of any financial institution to the extent insured by an agency of the United States Government.

“Fiduciary” means any person who exercises any power of control, management, or disposition, or renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of this Escrow, or has any authority or responsibility to do so, or who has any authority or responsibility in the administration of this Escrow.

“Fund” or “Escrow” means the account by which deposits and earnings are maintained.

“Grantor” means **[SUBMITTER]**, and any successors or assigns of **[SUBMITTER]**.

“EGLE” means the Michigan Department of Environment, Great Lakes, and Energy, or any successor department or agency.

All other terms used in this Escrow Agreement which are defined in Part 213 of the NREPA shall have the same meaning as in Part 213 of the NREPA.

## **II. AMOUNT OF ESCROW FUND**

The Grantor shall provide financial assurance in the form of an Escrow as required by the Corrective Action Plan. The Escrow shall be secured in the amount of **[amount in written text] (\$[number])** and be maintained consistent with the provisions of the Corrective Action Plan. The Fund shall remain in an amount sufficient to cover long-term corrective action costs at the Site for a thirty (30) year period. Sixty (60) days prior to the five (5) year anniversary of the Effective Date of this Escrow Agreement and each subsequent five (5) year anniversary, the Grantor shall provide to EGLE a report containing the actual long-term corrective action costs for the previous five (5) year period and an estimate of the amount of funds necessary to assure long-term corrective action costs for the following thirty (30) year period. If this cost estimate differs from the amount of the Escrow EGLE may determine that an amendment of the Escrow Agreement pursuant to Section XVI (AMENDMENT OF THE ESCROW AGREEMENT) is warranted.

## **III. NOTICES**

All notices, deliveries, or other communications required or permitted hereunder shall be deemed given when sent by facsimile transmission and confirmed by certified or registered mail addressed as follows:

(A) For Escrow Agent:

**[insert Escrow Agent name]**  
ATTN: **[insert contact person's name]**  
**[Address or P.O. Box]**  
**[City], [State] [Zip Code]**  
Telephone No.: **[insert telephone no.]**  
FAX No.: **[insert fax no.]**

(B) For EGLE:

(1) For questions regarding invoice reimbursement, escrow review and/or financial issues:

**[insert name of Case Coordinator], [insert Unit]**  
Compliance and Enforcement Section  
Remediation and Redevelopment Division  
Michigan Department of Environment, Great Lakes, and Energy  
P.O. Box 30426  
Lansing, Michigan 48909-7926  
Telephone No.: **[insert telephone no.]**  
FAX No.: **[insert fax no.]**

(2) For payments sent to EGLE:

Accounting Services Center  
Cashier's Office for EGLE  
P.O. Box 30657  
Lansing, Michigan 48909-8157

(Via Courier)

Accounting Services Center  
Cashier's Office for EGLE  
Van Wagoner Building, 1<sup>st</sup> Floor  
425 West Ottawa Street  
Lansing, Michigan 48933-2125

(C) For Grantor:

**[SUBMITTER]**  
ATTN: **[insert contact person's name]**  
**[Address or P.O. Box]**  
**[City], [State] [Zip Code]**  
Telephone No.: **[insert telephone no.]**  
FAX No.: **[insert fax no.]**

The Site name, and Facility No. **[insert Facility number]** shall be included on any notices sent to EGLE.

#### **IV. ESTABLISHMENT OF FUND**

The Grantor and the Escrow Agent hereby establish the Fund for the use and benefit of EGLE with the intent to assure the effectiveness and integrity of the corrective action as described in the Corrective Action Plan. The Fund is established initially as consisting of the Escrow Assets described in Exhibit A of this Escrow Agreement, all of which are acceptable to the Escrow Agent. Such Escrow Assets or any other assets subsequently transferred to the Escrow Agent are collectively referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Escrow Agent pursuant to this Escrow Agreement. The Escrow will be held by the Escrow Agent, as hereinafter provided. The Escrow Agent undertakes no responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments required to be made by the Grantor to the Escrow Agent or for payments required of the Grantor. The Escrow Agent shall notify the Beneficiary in writing of contributions made to the Escrow by the Grantor.

## **V. SECURE PERFORMANCE**

The Fund so established shall be used solely to pay EGLE for monitoring, operation, and maintenance necessary to assure the effectiveness and integrity of the corrective action documented in the Corrective Action Plan and to meet **[SUBMITTER'S]** financial assurance obligations as set forth in the Corrective Action Plan. Upon receipt of a notice of request for reimbursement from the Beneficiary, the Escrow Agent shall reimburse EGLE. All notices of request for disbursement, except for the Escrow Agent's fee which is to be paid to the Escrow Agent directly by the Grantor, are to be made by the Beneficiary to the Escrow Agent with a copy sent to the Grantor. The Escrow Agent shall remit payment to EGLE within thirty (30) days of receipt of the notice. Funds disbursed to EGLE under this Paragraph shall be delivered to the address indicated in Subsection (B) (2) of Section III (Notices).

## **VI. PAYMENTS COMPRISING THE FUND**

The Escrow Assets placed with the Escrow Agent by the Grantor shall consist of cash and/or direct obligations of the U.S.A. or the State of Michigan, or obligations for which the principal and interest are unconditionally guaranteed by the U.S.A. or the State of Michigan, or certificates of deposit of any financial institution to the extent insured by an agency of the United States Government.

## **VII. ESCROW AGENT MANAGEMENT**

The Escrow Agent shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with prudent investment guidelines. In investing, reinvesting, exchanging, selling, and managing the Fund, the Escrow Agent or any other fiduciary will discharge its duties with respect to the Fund solely in the interest of the participants and the Beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matter, would use in the conduct of an enterprise of like character and with like aims, except that:

(A) Securities or other obligations of the Grantor or any other owner or operator of the Site, or any of their affiliates as defined in the Investment Companies and Advisors Act of 1940, as amended, 15 U.S.C. Section 80a-2(a), shall not be acquired or held on behalf of the Fund unless they are securities or other obligations of the U.S.A. or the State of Michigan;

(B) The Escrow Agent is authorized to invest the Fund in time or demand deposits of the Escrow Agent or any other financial institution to the extent such Escrow Assets are insured by an agency of the United States Government and to the extent such time and demand deposits shall mature not later than one (1) year from the date of the investment;

(C) The Escrow Agent is authorized to hold cash while awaiting investment or investment distribution for a reasonable time and without liability for the payment of interest thereon.

## **VIII. COMMINGLING AND INVESTMENTS**

The Escrow Agent is expressly authorized in its discretion and in accordance with the investment policies and guidelines transmitted to the Escrow Agent pursuant to this Escrow Agreement to transfer from time to time any or all of the assets of the Fund to any common,

commingled, or collective fund created by the Escrow Agent in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other escrows participating therein so long as such management does not conflict with the requirements of this Fund. To the extent of the equitable share of the Fund in any such commingled fund, such commingled funds will be part of the Fund.

#### **IX. EXPRESS POWERS OF ESCROW AGENT**

Without in any way limiting the powers and discretions conferred upon the Escrow Agent by the other provisions of this Escrow Agreement by law, the Escrow Agent is expressly authorized and empowered:

(A) To make, execute, acknowledge, and deliver any and all documents of transfers and conveyances and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(B) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve Bank, but the books and records of the Escrow Agent will at all times show that all such securities are part of the Fund;

(C) To deposit any cash in the Fund maintained in interest-bearing accounts or saving certificates issued by the Escrow Agent, in its separate corporate capacity, or in any other banking institution affiliated with the Escrow Agent, to the extent insured by an agency of the U.S.A. Government;

(D) To sell, exchange, convey, transfer or otherwise dispose of any other property held on behalf of the Fund, by public or private sale. No person dealing with the Escrow Agent shall be bound to see the application of the purchase money or to inquire into the validity of expediency of any such sale or other disposition; and

(E) To comprise or otherwise adjust all claims in favor of or against the Fund.

#### **X. TAXES AND EXPENSES**

All taxes of any kind that may be assessed or levied against or in respect to the Fund and monthly maintenance fee (such fee shall include any necessary advice of counsel) incurred by the Escrow Agent or Fund will be paid directly by the Grantor.

#### **XI. ACCOUNTING FOR THE FUND**

The Escrow Agent shall annually, at least thirty (30) days prior to the anniversary date of establishment of the Fund; furnish to the Grantor and the Beneficiary a written statement of the current value of the Fund. Any securities in the Fund shall be valued at market value as of no more than sixty (60) days prior to the anniversary date established for the Fund.

The accounting shall show in reasonable detail the following:

- (A) The total funds deposited into the Fund;
- (B) Accrued earnings on the funds deposited into the Fund;
- (C) The amount of the funds that have been paid out of the Fund; and
- (D) The remaining balance of the Fund.

## **XII. ADVICE OF COUNSEL**

The Escrow Agent may from time to time consult with counsel, who may be counsel to the Beneficiary, with respect to any questions arising as to the construction of this Escrow Agreement or any action to be taken hereunder. The Escrow Agent shall be fully protected, to the extent permitted by law, in acting upon the advice of its own counsel.

## **XIII. ESCROW AGENT COMPENSATION**

The Escrow Agent will be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor. Payment shall be made directly by the Grantor and not from the Fund.

## **XIV. SUCCESSOR ESCROW AGENT**

The Escrow Agent may be replaced upon providing ninety (90) days written notice to the Escrow Agent from the Beneficiary or the Grantor. The Escrow Agent may resign after giving ninety (90) days written notice to the Grantor and the Beneficiary. In either event, upon written concurrence of the Beneficiary, the Grantor will appoint a successor Escrow Agent who will have the same powers and duties as those conferred upon the Escrow Agent hereunder. Upon acceptance of the appointment of a successor Escrow Agent by EGLE, the successor Escrow Agent and the Grantor will sign a new Escrow Agreement with identical terms as this Escrow Agreement and forward it to EGLE for signature. Upon EGLE signature, the Escrow Agent will assign, transfer, and pay over to the successor Escrow Agent, the funds then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Escrow Agent, the Escrow Agent may apply to a court of competent jurisdiction for the appointment of a successor Escrow Agent or for instructions. The successor Escrow Agent shall notify the Beneficiary, the Grantor, and the present Escrow Agent in writing by certified mail of the date upon which it will assume administration of the Fund at least ten (10) days before such change becomes effective. Any expenses incurred by the Escrow Agent as a result of any of the actions performed under this section will be paid as provided in Section X (Taxes and Expenses).

## **XV. INSTRUCTIONS TO THE ESCROW AGENT**

All orders, requests, and instructions by the Beneficiary to the Escrow Agent will be in writing and signed by the Beneficiary's authorized representative (in accordance with EGLE delegation authority). The Escrow Agent shall act and, in so acting, will be fully protected if acting in accordance with such orders, requests, and instructions. The Escrow Agent will have no duty to act in the absence of such orders, requests, and instructions from the Beneficiary, except as provided for herein.



## **XVI. AMENDMENT OF THE ESCROW AGREEMENT**

This Escrow Agreement may be amended by an instrument in writing executed by the Escrow Agent, Grantor, and the Beneficiary; or by the Escrow Agent and the Beneficiary if the Grantor ceases to exist.

## **XVII. IRREVOCABILITY AND TERMINATION**

Subject to the right of the parties to amend this Escrow Agreement as provided in Sections XIV (Successor Escrow Agent) and XVI (Amendment of the Escrow Agreement), this Fund will be irrevocable and continue until terminated by the written notification of the Beneficiary.

If the Escrow Agreement is terminated for any reason, the Escrow Amount shall be transferred to the Beneficiary for deposit in the Environmental Response Fund.

The Escrow Agreement shall be terminated when the Escrow Agent receives written notice from the Beneficiary that the Fund is no longer necessary.

## **XVIII. IMMUNITY AND INDEMNIFICATION**

The Escrow Agent will not incur personal liability of any nature in connection with any act or omission made in good faith in the administration of this Fund, or in carrying out any directions by EGLE issued in accordance with this Escrow Agreement.

The Escrow Agent will be indemnified and saved harmless by the Grantor, from and against any personal liability to which the Escrow Agent may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense.

## **XIX. CHOICE OF LAW**

This Escrow Agreement will be administered, construed, and enforced according to the laws of the State of Michigan.

## **XX. INTERPRETATION**

As used in this Escrow Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Escrow Agreement will not affect the interpretation or the legal efficacy of this Escrow Agreement.

The parties herein enter into and duly execute this Escrow Agreement. Furthermore, the Grantor and Escrow Agent below certify that the wording of this Escrow Agreement is identical to the wording specified by EGLE as of the effective date of this Escrow Agreement which is the date it is entered by the last signatory.

**FOR *[insert name of Grantor]*, THE GRANTOR**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_  
Print or Type

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) SS

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_), by ***[insert name of Grantor's authorized representative]***, the ***[insert title of Grantor's authorized representative]*** of ***[insert name of Grantor]***, a ***[insert state of incorporation]*** corporation, on behalf of the corporation, the Grantor named in the foregoing instrument.

\_\_\_\_\_  
Signature of Notary

Commission Expires: \_\_\_\_\_

**FOR *[insert the name of the Escrow Agent]*, THE ESCROW AGENT**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_  
Print or Type

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) SS

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_), by ***[insert name of Escrow Agent's authorized representative]***, the ***[insert title of Escrow Agent's authorized representative]*** of ***[insert name of Escrow Agent]***, a ***[insert state of incorporation]*** corporation, on behalf of the corporation, the Escrow Agent named in the foregoing instrument.

\_\_\_\_\_  
Signature of Notary

Commission Expires: \_\_\_\_\_

**FOR THE MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND  
ENERGY, THE BENEFICIARY**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_  
Print or Type

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) SS

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_), by ***[insert name of EGLE authorized representative]***, the ***[insert title of the EGLE authorized representative]*** on behalf of the Beneficiary named in the foregoing instrument.

\_\_\_\_\_  
Signature of Notary

Commission Expires: \_\_\_\_\_

**EXHIBIT A**

**Escrow Assets**

The Escrow Fund is established initially as consisting of the following:

***[Describe the nature and amount(s) of the Escrow Assets.]***

By their signatures below, the parties agree that this Exhibit A is incorporated into and made a part of the Escrow Agreement dated ***[insert effective date of Escrow Agreement]***.

**FOR *[insert name of Grantor]*, THE GRANTOR**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_  
Print or Type

**FOR *[insert name of Escrow Agent]*, THE ESCROW AGENT**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_  
Print or Type

**FOR THE MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, THE BENEFICIARY**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_  
Print or Type